LAW REVIEW 964

Held a Position of Employment

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1.3.1.1—Left Job for Service and Gave Prior Notice

There are six conditions that you must meet to have the right to reemployment after a period of service in the uniformed services. In this article, I address in detail the first condition: That you held a position of employment. Before we get to the question of whether you left a position of employment for the purpose of performing uniformed service (Law Review 0966), we must first define the term "position of employment" for USERRA purposes.

"Subject to subsections (b), (c), and (d) and to section 4304, any person whose *absence from a position of employment* is necessitated by reason of service in the uniformed services shall be entitled to reemployment rights and benefits and other employment benefits of this chapter if—[the person meets the USERRA eligibility criteria]." 38 U.S.C. 4312(a) (emphasis supplied).

What is a position of employment? USERRA does not define the term "position of employment," but it does define "employee" and "employer" as follows:

"The term "employee" means any person employed by an employer. Such term includes any person who is a citizen, national, or permanent resident alien of the United States employed in a workplace in a foreign country by an employer that is an entity incorporated or otherwise organized in the United States or that is controlled by an entity organized in the United States, within the meaning of section 4319(c) of this title." 38 U.S.C. 4303(3).

"(A) Except as provided in subparagraphs (B) and (C), the term "employer" means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including—

(i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;

(ii) the Federal Government;

(iii) a State;

(iv) any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph; and

(v) a person, institution, organization, or other entity that has denied initial employment in violation of section 4311.

(B) In the case of a National Guard technician employed under section 709 of title 32, the term "employer" means the adjutant general of the State in which the technician is employed.

(C) Except as an actual employer of employees, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)) shall be deemed to be an employer only with respect to the obligation to provide benefits described in section 4318." 38 U.S.C. 4303(4).

Students are not employees.

USERRA does not apply to the relationship between a student and an educational institution, because this is not an employee-employer relationship. No other federal law protects the rights of students temporarily leaving an educational institution, short of having attained the degree or other objective, for voluntary or involuntary military service, but 11 states have enacted such protections at the state level. Please go to www.roa.org/law_review. In the Subject Index, go to Category 1.1.2.4, with respect to students and USERRA.

Volunteers are not employees.

USERRA does not apply to the relationship between a *volunteer* and an agency or organization for which the volunteer performs voluntary service. If the individual is not receiving compensation, this is not an employer-employee relationship.

Partners are not employees.

USERRA does not apply to the relationship among partners in a partnership—like a law firm or medical partnership. See Law Review 99. Some law firms include attorneys who are called "non-equity partners." I believe that the term is an oxymoron. If you don't have an equity or ownership interest in the firm, you are not a partner—just an associate (employee) with a bit higher status. Associates in the firm can clearly have reemployment rights, and non-equity partners arguably can have such rights, but a true partner in the firm is not an employee and cannot have reemployment rights with respect to the firm.

Independent contractors are not employees.

An independent contractor is not an employee, but the employer cannot make an employee an independent contractor simply by labeling the person as such. The determination of independent contractor status depends on numerous factors.

USERRA's legislative history (showing the intent of Congress) addresses directly and succinctly the broad and expansive interpretation of the term "employee": "Section 4303(3) would define 'employee' in the same expansive manner as under the Fair Labor Standards Act, 29 U.S.C. 203(e), … and the issue of independent contractor versus employee should be treated in the same manner as under the Fair Labor Standards Act. *See Brock v. Mr. W Fireworks Inc.,* 814 F.2d 1042 (5th Cir. 1987)." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2454.

In the *Brock* case, the secretary of labor (William Brock) sued a fireworks company to enforce the Fair Labor Standards Act (minimum wage and overtime rules) with respect to the individuals who operated the company's fireworks stands. The District Court dismissed the lawsuit, holding that the operators were independent contractors and not employees. The secretary of labor appealed, and the Court of Appeals reversed the District Court, noting that the fireworks company controlled almost all aspects of the businesses and that the operators were economically dependent upon the fireworks company. It is clear that Congress intended that this liberal interpretation of employee should also apply under USERRA.

Section 4331 of USERRA (38 U.S.C. 4331) gives the secretary of labor the authority to promulgate regulations about the application of this law to state and local governments and private employers. The secretary did promulgate such regulations and published them in the *Federal Register* on Dec. 19, 2005. The regulations are published in Title 20, Code of Federal Regulations, Part 1002.

"*Does USERRA cover an independent contractor?* (a) No. USERRA does not provide protections for an independent contractor. (b) In deciding whether an individual is an independent contractor, the following factors must be considered: (1) the extent of the employer's right to control the manner in which the individual's work is to be performed; (2) the opportunity for profit or loss that depends upon the individual's managerial skill; (3) any investment in equipment or materials required for the individual's tasks, or his or her employment of helpers; (4) whether the service the individual performs requires a special skill; (5) the degree of permanence of the individual's working relationship; and, (6) whether the service the individual performs is an integral part of the employer's

business. (c) No single one of these factors is controlling, but all are relevant to determining whether an individual is an employee or an independent contractor." 20 C.F.R. 1002.44.

When the secretary of labor published the USERRA Regulations on Dec. 19, 2005, she also published a lengthy and scholarly preamble, addressing in detail the intent behind these regulations and addressing the comments that were received after the secretary had published proposed USERRA Regulations in the *Federal Register* in September 2004. The preamble can be found in the 2005 edition of the *Federal Register* (pp. 75246-75292). I invite the reader's attention to a lengthy and scholarly discussion of the distinction between employees and independent contractors, for USERRA purposes (pp. 75253-75254).

Congress enacted USERRA in 1994, as a complete rewrite of the Veterans' Reemployment Rights Act (VRRA), which can be traced back to 1940. The VRRA did not confer rulemaking authority on the secretary of labor, but the Department of Labor published its *Veterans' Reemployment Rights Handbook* in 1957, 1970, and 1988. Several courts have given some weight to the interpretations expressed in the *Handbook* in determining the meaning and intent of the reemployment statute. *See, e.g., Leonard v. United Air Lines Inc.,* 972 F.2d 155, 159 (7th Cir. 1992). I discuss *Leonard* in detail in Law Review 0857.

"In order to be protected by the reemployment statute, an employee must leave a position in the employ of an employer with the intent to perform military training or service, or to be examined for such training or service. An employer-employee relationship must exist, as distinguished from the relationship between partners in a business and from the relationship between an independent contractor and the firms for which he performs work. Although there is no specific definition in the statute, Congress intended that the statute should be liberally construed in determining whether an employer-employee relationship exists. An employer-employee relationship generally exists when one party hires, supervises, commends and disciplines, exercises management discretion, generally controls the work environment, or pays wages or salaries in exchange for labor or services of another party." *Veterans' Reemployment Rights Handbook,* 1988 edition, page 3-1.

The *Handbook* also contains multiple examples in each chapter, illustrating the meaning and operation of the reemployment statute. I invite the reader's attention to Example 2 in Chapter 3 of the 1988 *Handbook:*

"Mr. B operates a small insurance agency with the aid of a secretary hired and paid by him. His only compensation is in the form of commissions on various kinds of insurance policies he sells for the Q Group of insurance companies. By agreement with Q, he sells no other insurance, uses Q's name in his advertising, and is required to follow detailed business procedures prescribed by Q. He is a commissioned officer in the Coast Guard Reserve, and he is recalled to active duty during the Mariel Boat Lift Crisis of 1980.

B is an employee within the meaning of the statute, and not a true independent contractor. The result would be different if he also sells substantial amounts of insurance for other companies and generally exercises a greater degree of independence in operating the agency. All the surrounding facts must be considered in determining whether a person is an employee or an independent contractor." *Handbook,* page 3-5.

A physician with privileges at a hospital is not an employee of the hospital.

A physician in private practice will need to have "privileges" at one or more hospitals, but the physician's relationship with the hospital is not an employee-employer relationship. Thus, USERRA does not require the hospital to restore the privileges of a physician who has been away from his or her civilian practice for service in the uniformed services. See Law Review 192.

Persons holding temporary, probationary, or "at will" jobs can have reemployment rights.

The returning veteran's pre-service position need not have been "permanent" or even "other than temporary" for the veteran to have the right to reemployment under USERRA. The law accords reemployment right to persons who leave temporary, part-time, seasonal, probationary, or "at will" jobs for uniformed service. Please see Law Reviews 101, 0609, 0616, 0621, 0730, 0804, 0863, and 0936.

Employees who have been laid off can have reemployment rights.

An individual who has been laid off or furloughed is still considered to hold a position of employment with the employer, so long as there is a possibility that the person will be called back to work when business conditions improve. A person who leaves a layoff or furlough situation to perform uniformed service can have the right to reemployment. Of course, the person must still meet the other USERRA eligibility criteria, including giving prior notice to the employer. Please see Law Reviews 31, 39, 0756, and 0911.

Persons who work through hiring halls can have reemployment rights.

In some industries and professions (construction industry workers, longshoremen, stagehands, etc.), it is common for an individual to string together a series of short-term job assignments into a career. A hiring hall, typically operated by the union, assigns workers to employers as needed. When a worker completes a short-term assignment, he or she returns to the hiring hall for the next assignment, and this process can continue for decades. A person who leaves such a situation for uniformed service can have reemployment rights under USERRA. Please see Law Reviews 28, 174, 183, and 0712.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at swright@roa.org or 800-809-9448, ext. 730.